



October 3, 2000

Mr. Aric J. Garza
Escamilla & Poneck, Inc.
Attorneys and Counselors
P.O. Box 200
San Antonio, Texas 78291-0200

OR2000-3790

Dear Mr. Garza:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139707.

The Jourdanton Independent School District (the "district"), which you represent, received a request for copies of any and all files, records and documentation pertaining to the job performance of a specified employee and job descriptions of the position held by the specified employee. You state the district will be providing the requestor with copies of job descriptions and other information subject to public disclosure contained in the personnel file of the specified employee. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim that the submitted information is excepted under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard*

v. Houston Post Co., 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You claim that the employee has threatened the district with litigation and has hired attorneys to represent her interests. However, the mere fact that an individual has hired an attorney or made threats of litigation does not establish that litigation is reasonably anticipated. Further, you have failed to provide us a copy of any correspondence, such as the June 2, 2000, letter from the employee's attorney which is referenced in the submitted documents, to establish that the attorney has threatened litigation against the district. You also assert that the employee's pending grievance before the district is analogous to pending litigation. This office has determined that a contested case under the Administrative Procedure Act (the "APA"), Government Code chapter 2001, constitutes "litigation." *See* Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). However, you do not indicate that the district's grievance procedures are conducted pursuant to the APA. Thus, we conclude that you have not demonstrated that litigation is reasonably anticipated. Therefore, you may not withhold the submitted information under section 552.103.

We note that one of the submitted documents which may not be withheld under section 552.103 contains medical information protected under section 552.101 and common law privacy. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or

embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* However, section 552.023 of the Government Code grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. In this instance, the requestor is the attorney of the individual whose privacy is being protected. Thus, the individual's authorized representative has a special right of access to the information protected under section 552.101 and common law privacy.

Further, the submitted information contains a performance evaluation of an administrator. Section 552.101 also encompasses information protected by statute. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). Therefore, we conclude that the marked information, which evaluates the performance of an administrator, must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, it does not appear that the last two pages of the marked information, titled "District Support for the Special Education Program," evaluates the administrator and, therefore, the last two pages may not be withheld under section 552.101 and 21.355 of the Education Code.

You also claim a portion of the submitted documents are excepted by section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). A "confidential communication" is a communication "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Tex. R. Evid. 503(a)(5). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

You assert that the marked information includes either legal advice rendered by the district's attorney or information that reveals the attorney's legal advice, opinion, and recommendations concerning the district's dealings with the employee. You also claim that some of the

documents were created by the attorney and contain client confidences, legal advice and opinion. Having reviewed the submitted information, we conclude that some of the information may be withheld under section 552.107(1). We have marked the information you may withhold under section 552.107(1).

However, you marked an e-mail from the superintendent to certain unidentified individuals under section 552.107(1). You have not explained nor is it apparent from the face of the document that the e-mail was sent to the district's attorney. Further, you have marked two pages which detail district support for the special education program under section 552.107(1), but you have not demonstrated that these two pages are a client confidence. This office will not assume that records are protected under the attorney-client privilege absent the threshold demonstration that the records were created by an attorney in the furtherance of legal services to the client or that the records consist of a client confidence. *See* Open Records Decision No. 574 (1990). Further, the submitted information contains fax cover sheets and fax log reports which are not excepted under section 552.107(1). *See* Open Records Decision No. 574 (1990) (the factual recounting of events, including the documentation of calls made, meetings attended, and memos sent, are not excepted from disclosure by section 552.107(1)). Therefore, you may not withhold the e-mail, the two pages concerning special education, or the fax sheets and reports under section 552.107(1).

You also assert that the two pages concerning the district support of the special education program are excepted under section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure interagency and intraagency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). The purpose of this section is “to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (emphasis added). However, an agency's policymaking functions do not encompass internal administrative or personnel matters, as disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (records relating to problems with specific employee do not relate to making of new policy but merely implement existing policy); Open Records Decision No. 615 at 5-6 (1993). *But see* Open Records Decision No. 631 (1995) (finding personnel matters of a broader scope were excepted from disclosure under section 552.111). In addition, section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 4-5 (1993).

After reviewing the submitted information, we conclude that the two pages contain observations of facts and events and do not contain advice, recommendations, opinions, or other material reflecting the policymaking processes of the governmental body. Therefore, the district may not withhold the information about the special education program under section 552.111 of the Government Code.

In conclusion, you must withhold the marked documents that evaluate an administrator under section 552.101 and section 21.355 of the Education Code. Further, you may withhold the marked information under section 552.107(1) of the Government Code. You must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

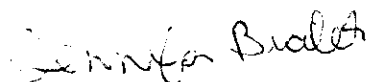
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Bialek".

Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\er

Ref: ID# 139707

Encl: Submitted documents

cc: Mr. Steven A. Sinkin
Sinkin And Barretto, P.L.L.C.
105 West Woodlawn
San Antonio, Texas 78212
(w/o enclosures)